Dole Fresh Vegetables, Inc. *and* **International Union of Operating Engineers, Local 20.** Cases 9–CA–38067–1, 9–CA–38067–2, and 9–CA–38090–1

July 17, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On June 19, 2001, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified[3] and set forth in full below.

The judge found, and we agree, that the Respondent violated the Act by reducing the wage rates of two maintenance leadmen and one acting maintenance leadman. In its exceptions, the Respondent contends, inter alia, that the judge erred in failing to find that all three individuals are supervisors within the meaning of Section 2(11) of the Act. Although we find no merit in the Respondent's exceptions, there are three issues that warrant further discussion.

1. The Respondent contends that the judge impermissibly relied on the Regional Director's Decision and Direction of Election in the earlier representation case as substantive evidence that the maintenance leads[4] are not 2(11) supervisors.[5] In a case like this one alleging independent violations of Section 8(a)(1) or (3), the Board may accord "persuasive relevance" to prior representation case findings, "subject to reconsideration and to any additional evidence adduced in the unfair labor practice case." *Brusco Tug & Barge Co.*, 330 NLRB 1188, 1189 (2000), enf. denied on other grounds 247 F.3d 273 (D.C. Cir. 2001), citing *Serv-U Stores*, 234 NLRB 1143, 1144 (1978), and *Air Transit, Inc.*, 256 NLRB 278, 279 (1981). Here, the judge correctly recognized that the Respondent was entitled to relitigate the issue of the status of the maintenance leads, and he properly considered all the record evidence, including the Regional Director's findings in the representation proceeding.

2. The Respondent contends that the judge did not properly consider the evidence presented at the hearing ostensibly showing that the maintenance leads are Section 2(11) supervisors. First, the Respondent contends that because quality assurance lead Lisa Cole and production lead Heather Strelsky testified that they exercised supervisory authority, then so, too, must the maintenance leads because "all leads possess the same level of authority." The record evidence does not support this conclusory statement. Nor does the job title of "lead" support a finding of supervisory status. It is well settled that "[t]he status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification." *T. K. Harvin & Sons*, 316 NLRB 510, 530 (1995).

The Respondent also contends that the judge did not properly consider the testimony of Maintenance Supervisors Donnie Stevens and Joe Clark. Upon a review of the entire record, including the testimony of Stevens and Clark, we find that the Respondent has failed to establish that the maintenance leads were supervisors within the meaning of Section 2(11) of the Act.

Stevens and Clark were maintenance leads before being promoted to supervisors. While serving as leadmen, the record shows that Clark and Stevens did not transfer employees, authorize overtime, resolve employee grievances, issue discipline, or hire employees. Maintenance Manager Bill Vith prepared and completed employee evaluations, or directed others concerning how to do so, and was the decisionmaker in all matters concerning hiring and discipline. Although Clark testified that he reported "performance issues" to Vith, there is no evidence that he made effective recommendations regarding his observations. Likewise, Stevens testified that he provided "input" to Vith for the evaluation of one employee and that the employee received a 25-cent raise after the evaluation. The record shows, however, that the raise was an automatic 6-month increase received by all employees. While Clark claimed that he was involved in

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify Conclusion of Law 3 to conform to the judge's findings in the analysis section of his decision.

[3] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), *Excel Container, Inc.*, 325 NLRB 17 (1997), and *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall also modify the recommended Order and notice to conform to the judge's findings of fact and conclusions of law as set forth in his decision. Finally, we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[4] As used in this decision, the term "maintenance leads" refers to all 3 persons involved.

[5] The Regional Director found that the maintenance leads are not supervisors. The request for review was denied.

the assignment of work, our review of the record shows that any assignment of jobs was made in a routine manner. The maintenance employees have regularly scheduled breaks and lunchtimes, and the leads spend about two-thirds of their time working alongside other employees on their shift. The other one-third they spend on their own projects or completing "shift notes" that document the work completed by the crew. Stevens testified that on one occasion, he granted an employee time off from work and left a note for his supervisor advising him of this action. This isolated event does not rise to the level of independent judgment required to find that the leads exercise statutory authority.

After the Respondent promoted Clark to maintenance supervisor, Clark had maintenance lead Larry Saunders, an electronics specialist, assist him in an interview in order to evaluate a particular applicant's knowledge of electronics. The record shows, however, that Saunders did not participate in the decision of whether to hire the applicant, and was never again asked to assist in an interview.

In finding that the maintenance leads do not exercise supervisory authority in the issuance of discipline, the judge found "a single instance" where maintenance lead Larry Saunders issued a written warning to employee Joe Lehner. The judge found that Maintenance Manager Bill Vith ordered Saunders to sign the warning.

The record also contains two written warnings signed by maintenance lead Robert Ford, which the judge did not mention. The Regional Director addressed one of these warnings in his Decision and Direction of Election. As was the case with the Saunders warning, the Regional Director found that the Ford warning was initiated by and prepared at the direction of Vith. A warning initiated by a superior and signed at the direction of the superior does not constitute evidence of supervisory authority to discipline employees. See *NLRB v. Security Guard Service*, 384 F.2d 143, 148 (5th Cir. 1967) (sergeant's role in the suspension of a guard not supervisory when "in reality" it was a superior who decided to suspend the guard).

The third written warning, signed by Ford, was not addressed by either the judge or the Regional Director. The Respondent has offered no evidence that the circumstances surrounding this warning were different from the two mentioned above.

The burden of proving 2(11) supervisory status rests with the Respondent as the party asserting it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Based on the evidence presented at the hearing in this matter, including the Regional Director's findings in the representation case, we find that the Respondent has failed to satisfy its burden of establishing that the maintenance leads exercise supervisory authority over the employees in their department.

3. The judge found that the Respondent violated Section 8(a)(3) when it reduced the wages of maintenance leads Saunders, Ford, and Mann because of their union activities. The judge further found that the Respondent violated Section 8(a)(4) as to Saunders and Ford, when it took such action because Saunders and Ford testified at a Board proceeding.

In its exceptions, the Respondent contends that the General Counsel failed to meet his burden to prove that the Respondent's reduction of the maintenance leads' wage rates was motivated by animus toward the employees' protected activities. Rather, the Respondent contends, it took this action in order to "reinforce" its position that the maintenance leads are 2(11) supervisors. The Respondent explains that "it is only in the context of an 8(a)(1) or (3) complaint that Respondent can obtain a comprehensive consideration of the 2(11) status of the Maintenance Leads." Thus, the Respondent argues, its actual motive was a lawful one. Further, even assuming that the General Counsel established that the wage reductions were unlawfully motivated, the Respondent contends that it has established that it would have reduced the wages of the leadmen even in the absence of their protected activities. For the reasons stated below, we adopt the judge's finding that the Respondent's reduction of the wages of Saunders, Ford, and Mann violated Section 8(a)(3) and (4) of the Act.[6]

Background

In July 2000 the Union commenced an organizational campaign among the employees in the Respondent's maintenance department. Saunders, Ford, and Mann all signed union authorization cards. The Union filed a representation petition in Case 9–RC–17437, and a hearing was held on August 30, 2000. Saunders and Ford were subpoenaed to testify. Their testimony was contrary to the Respondent's position that they were supervisors and should be excluded from the unit.

On September 19, 2000, the Regional Director issued his Decision and Direction of Election, finding, inter alia,

[6] As explained below, unlike the judge, we do not rely on two antiunion meetings the Respondent held as evidence of antiunion animus.

In pars. 1 and 4 of his analysis of the wage reduction issue, the judge stated that Maintenance Supervisor Donnie Stevens told Acting Maintenance Lead Floyd Mann that Respondent had added a supervisor and had plans to hire another. The record shows that Human Resource Manager Mike Yaus made this statement to Maintenance Lead Robert Ford. In par. 5 of the same section of his decision, the judge appears to find that Mann testified in the underlying representation hearing when, in fact, he did not. We correct these errors, which do not affect the outcome of the case.

that the maintenance leads were not supervisors and should be included in the unit. The Regional Director's finding of employee status was based substantially on the testimony provided by Saunders and Ford. The Respondent filed a request for review of the Regional Director's decision, which was denied by the Board.

The Union won the October 19, 2000 Board election and, on November 21, 2000, was certified as the maintenance employees' bargaining representative. The Respondent, however, refused to bargain with the Union in order to test its certification. On May 11, 2001, the Board issued a Decision and Order granting the General Counsel's Motion for Summary Judgment and finding that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union. *Dole Fresh Vegetables, Inc.*, 333 NLRB No. 169 (2001) (not reported in Board volumes). On May 28, 2003, the Board's decision was enforced by the Sixth Circuit. *NLRB v. Dole Fresh Vegetables*, 334 F.3d 478 (2003). The court held that substantial evidence supported the Regional Director's finding, affirmed by the Board, that maintenance leads Saunders and Ford were not supervisors within the meaning of Section 2(11).

Meanwhile, approximately a week after the tally of ballots issued on October 31, 2000, showing that the Union had won the election, Saunders and Ford were summoned to separate meetings with management. Saunders was told that the Respondent still considered him a supervisor, that the Respondent was free to adjust his wages at any time and in any manner, and that his wage rate was being reduced by $1.75 per hour. Similarly, Ford was told that although "the NLRB had ruled that we were not management staff, they could adjust our pay rate at anytime they felt necessary." Ford's wage rate was also reduced by $1.75 per hour.[7]

A couple of days later, Mann was told by the Respondent that it "was going to take my dollar away for being acting lead because it wasn't fair that Larry [Saunders] and Bob [Ford] got their money taken away." Mann's wage reduction was actually $1.25 per hour.

Analysis

In *Great Dane*, the Supreme Court developed the following comprehensive framework for analyzing allegations of violations of Section 8(a)(3):

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967) (emphasis in original).[8]

Under this framework, if an action is deemed inherently destructive of employee rights, antiunion motivation is inferred and the conduct may be found unlawful, whether or not such conduct was based upon important business considerations. However, if the action is deemed to have only a comparatively slight impact on employee rights, an affirmative showing of antiunion motive must be made to sustain a violation, *if* the employer has first come forward with evidence of a legitimate and substantial business justification for its conduct.

Applying these principles to this case, we must first consider the degree to which the Respondent's conduct affected important employee rights. For the reasons that follow, we find that the Respondent's reduction in the wage rates of the three maintenance leads falls into the second category outlined in *Great Dane*, i.e., the adverse effect on employee rights was "comparatively slight."[9]

Based on the above recitation of facts and the Respondent's representations in its brief, it is clear that but for the union campaign and the testimony of Saunders and Ford in support of the Union's position at the representation proceeding, the Respondent would not have singled out the three maintenance leads and reduced their wage rates. The Respondent's discriminatory action, even if not "inherently destructive," has at least some adverse effect on important employee rights.[10]

[7] Although Ford was also told that the Respondent had just added a supervisor and had plans to add another, it appears that the Respondent is no longer contending that the wage reduction is justified on that basis.

[8] We shall apply the *Great Dane* framework by analogy to the 8(a)(4) allegation as well as to the 8(a)(3) allegation.

[9] The D.C. Circuit Court of Appeals explained the difference between "inherently destructive" and "comparatively slight" in *Boilermakers Local 88 v. NLRB*, 858 F.2d 756, 761–762 (1988). The court stated:

> It is clear that the Supreme Court intended the phrases "inherently destructive" and "comparatively slight" to encompass the universe of employer actions that have any non-trivial, adverse effect on employee rights. Thus, there is no undistributed middle: "comparatively slight" simply means "less than inherently destructive."

[10] Because we have rejected the Respondent's business justification defense, infra, the Respondent does not prevail under a *Great Dane* analysis, whether the Respondent's conduct was "inherently destructive" of employee rights or had a "comparatively slight" effect on those rights. Moreover, the Respondent's action here arguably was "inher-

The Respondent took the adverse action as a means of defeating the Union's organizational effort. That is, the Respondent was not content to rely upon the evidence in the representation case to support its contention that the persons were supervisors and that the certification was invalid. The Respondent sought to bolster its position by adducing further evidence, in an unfair labor practice case, that the persons were supervisors. The means for generating an unfair labor practice case was the taking of the adverse action.

"It is a fair assumption that in most instances where employees designate a union as their union representative, a major consideration centers on the hope that such representative may be successful in negotiating wage increases." *Tower Records*, 182 NLRB 382, 387 (1970), enfd. 79 LRRM 2736 (9th Cir. 1972). Here, the union campaign had exactly the opposite result, so far as the three maintenance leads were concerned. The Respondent's conduct is bound to discourage the exercise of Section 7 rights by sending an unmistakable message to employees that they cannot engage in union activities without placing their wages in jeopardy.

Since it has been proved that the Respondent engaged in discriminatory conduct with some adverse effect on employee rights, under *Great Dane* we must inquire whether the Respondent has shown that a "substantial and legitimate business end [was] served." *Great Dane*, 388 U.S. at 34. The Respondent has made no such showing here.

As summarized above, the Respondent's position is essentially that it reduced the wage rates of the three maintenance leads in order to provoke the filing of an unfair labor practice charge and complaint. The Respondent claims that its objective was to obtain "comprehensive consideration" of the status of the maintenance leads at a hearing where it could "reinforce" its position that they are statutory supervisors. In the representation proceeding, however, the Respondent had ample opportunity to obtain "comprehensive consideration" of the supervisory status of the maintenance leads. The Respondent took full advantage of that opportunity by presenting its evidence at a hearing and by filing a request for review with the Board. In addition, in the subsequent unfair labor practice proceeding, the Respondent had the opportunity to adduce at a hearing any newly discovered and previously unavailable evidence that it may have had bearing on the supervisory status of the maintenance leads. *Dole Fresh Vegetables*, 333 NLRB No. 169 (not reported in Board volumes). Further, before the court of appeals, the Respondent had the opportunity to seek judicial review of the Board's determination that the maintenance leads are not supervisors. Given the many legal avenues available to the Respondent for obtaining "comprehensive consideration" of the supervisory issue, we do not believe that a desire to "reinforce" its position with evidence that it could have presented a few months earlier, at the August 2000 representation hearing, rises to the level of a legitimate and substantial business justification for taking discriminatory action against three employees engaged in activities protected by the Act.

In sum, as the Supreme Court explained in *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375 (1967), *Great Dane* stands for the proposition that "proof of antiunion motivation is unnecessary when the employer's conduct 'could have adversely affected employee rights to *some* extent' and when the employer does not meet his burden of establishing 'that he was motivated by legitimate objectives.'" 389 U.S. at 380 (quoting *Great Dane*) (emphasis in original). That is precisely the situation here. Accordingly, for these reasons, we adopt the judge's finding of violations of Section 8(a)(3) and (1) of the Act.[11]

The same analysis applies with respect to the 8(a)(4) allegation concerning Saunders and Ford. The Respondent took adverse action against them in order to avoid the consequences of their testimony in the representation case. That adverse action had at least some chilling effect on the protected activity of testifying in a Board proceeding. And, as discussed above, there was no legitimate and substantial business justification for that adverse action.[12]

AMENDED CONCLUSION OF LAW

Delete the judge's Conclusion of Law 3, insert the following, and renumber subsequent paragraphs accordingly.

"3. The Respondent violated Section 8(a)(5) of the Act by unilaterally reducing the wage rates of maintenance leads Larry Saunders and Robert Ford, and acting

ently destructive" inasmuch as it was based entirely on the leadmen's status—established in the representation proceeding (and affirmed by the Sixth Circuit)—as protected employees.

[11] We also agree with the judge, for the reasons stated by him, that the Respondent violated Sec. 8(a)(5) by unilaterally reducing the wage rates of Saunders, Ford, and Mann. As the judge correctly recognized, an employer acts at its peril in making changes in terms and conditions of employment during the period between the Board election and the Union's certification. *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

[12] Even apart from the *Great Dane* analysis, however, the direct causal connection between the testimony of Saunders and Ford and their pay cuts seems clear: absent their testimony, there would have been no finding that the leadmen were not supervisors; the pay cuts, in turn, were aimed at getting that finding reversed. The 8(a)(4) violation is thus alternatively established.

lead Floyd Mann, without affording the Union notice and an opportunity to bargain over such changes.

"4. The Respondent violated Section 8(a)(4) and (1) of the Act by reducing the wage rates of Saunders and Ford because they gave testimony under the Act.

"5. The Respondent violated Section 8(3) and (1) of the Act by reducing the wage rates of Saunders, Ford, and Mann because of their union activities and union support."

ORDER

The National Labor Relations Board orders that the Respondent, Dole Fresh Vegetables, Inc., Springfield, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Reducing the wages of its employees because of their union activities or union support.

(b) Reducing the wages of its employees because they gave testimony under the National Labor Relations Act.

(c) Implementing unilateral changes in the wages of its employees without affording the Union notice and an opportunity to bargain over such changes.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with International Union of Operating Engineers, Local 20, as the exclusive representative of the employees in the following appropriate unit with respect to a decision to reduce employee wage rates

> All maintenance employees, including maintenance technicians, maintenance packaging technicians, maintenance parts clerks and maintenance leads, employed by Dole Fresh Vegetables, Inc. at its Springfield, Ohio facility, excluding all production employees, quality assurance employees, raw materials employees, sanitation employees, shipping and receiving employees, office clerical employees, all other employees, and all professional employees, guards and supervisors as defined in the Act.

(b) Restore the wage grades of Larry Saunders, Robert Ford, and Floyd Mann to the levels that existed prior to the unlawful wage reductions, plus any interim wage increases that have occurred or were given to any other classifications in a general wage increase since the unlawful reductions.

(c) Make Larry Saunders, Robert Ford, and Floyd Mann whole for any loss of earnings attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful wage reductions, and within 3 days thereafter notify the employees in writing that this has been done and that the wage reductions will not be used against them in any way.

(e) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Springfield, Ohio, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 8, 2000.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT reduce your wages because of your union activities or union support.

WE WILL NOT reduce your wages because you gave testimony under the Act.

WE WILL NOT implement unilateral changes in your wages without affording the Union notice and an opportunity to bargain over such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful actions taken against Larry Saunders, Robert Ford, and Floyd Mann, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the reductions in wages will not be used against them in any way.

WE WILL, on request, bargain with International Union of Operating Engineers, Local 20, as the exclusive representative of our employees in the following bargaining unit with respect to a decision to reduce employee wage rates:

All maintenance employees, including maintenance technicians, maintenance packaging technicians, maintenance parts clerks and maintenance leads, employed by Dole Fresh Vegetables, Inc. at its Springfield, Ohio facility, excluding all production employees, quality assurance employees, raw materials employees, sanitation employees, shipping and receiving employees, office clerical employees, all other employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL restore the wage grades of Larry Saunders, Robert Ford, and Floyd Mann to the levels that existed prior to the unlawful wage reductions, plus any interim wage increases that have occurred or were given to any other classifications in a general wage increase since the unlawful reductions.

WE WILL make Larry Saunders, Robert Ford, and Floyd Mann whole for any loss of earnings they may have suffered resulting from the unlawful wage reduction, plus interest.

DOLE FRESH VEGETABLES, INC.

Eric J. Gill, Esq., for the General Counsel.
Theodore R. Scott, Esq., for the Respondent.
John Gray, Business Manager, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This consolidated case was heard before me on March 28 and 29, 2001, in Springfield, Ohio, and on April 27, 2001, in Cincinnati, Ohio. The consolidated complaint was issued by the Acting Regional Director for Region 9 of the National Labor Relations Board (the Board) on January 8, 2001, and is based on charges filed by the International Union of Operating Engineers, Local 20, AFL–CIO (the Charging Party or the Union) on November 13, 2000, in Cases 9–CA–38067–1,–2 and on November 21, 2000, in Case 9–CA–38090–1. The complaint alleges that Respondent Dole Fresh Vegetables, Inc. (the Respondent or the Employer) has committed violations of Sections 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act). Respondent has by its answer duly filed, denied the commission of any violations of the Act, and has asserted affirmative defenses thereto.

On the entire record including the testimony of the witnesses and the exhibits received in evidence and after review of the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits and I find that at all times material, Respondent, a corporation, has been engaged in the processing and wholesale distribution of fresh vegetables at its Springfield, Ohio facility, that during the 12-month period preceding the filing of the complaint, Respondent, in conducting its operations described above, purchased and received at its Ohio facility goods valued in excess of $50,000 directly from suppliers located outside the State of Ohio, and that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT

The complaint alleges, Respondent denies and I find that at all times material herein the following employees of Respondent (the unit) constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All maintenance employees, including maintenance technicians, maintenance packaging technicians, maintenance parts clerks and maintenance leads, employed by [Respondent] at

its 600 Benjamin Drive, Springfield, Ohio facility, excluding all production employees, quality assurance employees, raw materials employees, sanitation employees, shipping and receiving employees, office clerical employees, all other employees, and all professional employees, guards and supervisors as defined in the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Reduction in Wages

The Union conducted an organizing campaign among the employees in Respondent's maintenance department in July 2000. A union organizing meeting was held on July 29, 2000, where a number of the maintenance employees signed union authorization cards including lead maintenance technicians Larry Saunders, Robert Ford, and then acting lead maintenance man Floyd Mann. The Union filed a representation petition for an election among the maintenance employees. A hearing was held in Case 9–RC–17437 on August 30, 2000. At the hearing lead maintenance technicians Saunders and Ford were subpoenaed to testify and testified that they did not perform supervisory duties which was contrary to the Employer's position at the representation hearing that they were supervisors and should be excluded from the unit.

On September 19, 2000, the Regional Director for Region 9 of the Board issued the Regional Director's Decision and Direction of Election. In his Decision the Regional Director made extensive findings of fact concerning the issue of alleged supervisory status of the lead maintenance technicians as the Employer contended they were supervisors and not appropriate for inclusion in the unit. The Regional Director concluded that the lead maintenance technicians should be included in the unit as they were not supervisors but rather were employees under Section 2(3) of the Act. The Employer filed a request for review of the Regional Director's Decision and Direction of Election, which was denied by the Board on October 24, 2000. On October 19, 2000, the Union won the representation election conducted by the Board as evidenced by the tally of ballots issued following the vote on October 31, 2000. On November 21, 2000, the Union was certified as the exclusive collective-bargaining representative of the Unit.

On November 8, 2000, Respondent's human resources manager, Michael Yaus, called lead maintenance technician Larry Saunders to a meeting in his office also attended by second-shift maintenance supervisor, Joe Clark, and first-shift maintenance supervisor, Donnie Stevens. Saunders testified that at the meeting Yaus told him that Respondent still considered him a supervisor and was free to adjust his wages at any time and in any manner. He then told Saunders he was reducing his wages and reduced his then current wage rate of $19.45 an hour to $17.70 an hour. Saunders testified he told Yaus "that instead of taking that large of a cut in pay that I would just relinquish my lead position because I was only getting a dollar more on the hour for being the lead person." Yaus then asked him if "I was resigning my position at Dole." Saunders replied that he did not want to quit his job but if he was going to lose $1.75 an hour he would relinquish his lead position as he was only receiving a dollar more an hour for the position. Yaus then told Saunders that if he relinquished his lead position, that he would be bumped "down to the starting maintenance wages, which was $13.50 which was almost a six dollar an hour cut in pay." Saunders then told Yaus he would keep his lead position and that Yaus could "do whatever you have to do." At the end of the meeting Yaus gave Saunders a job specification setting out a list of supervisor/lead responsibilities and duties which Saunders had never seen before that moment. Yaus gave Saunders no reason for the reduction in wages. Nor did he criticize Saunders' job performance.

Robert Ford also testified concerning these events. Ford was a lead maintenance technician in the maintenance department. Ford was a union supporter and attended a union meeting in July 2000, and signed a union card on July 29. Ford was also a witness subpoenaed by the Union at the August 30 hearing and testified adversely to the Employer's position which was that he and Saunders were supervisors. Ford testified at that hearing that the lead maintenance technicians were never informed that they had the supervisory duties and authority attributed to them by the Employer at that hearing. Ford testified that he and Saunders voted in the election although Respondent challenged their ballots which were ultimately counted.

Ford also testified that following the election he was called into a meeting in the maintenance manager's office by his supervisors, Joe Clark and Donnie Stevens. At that meeting Ford was told he was not performing the duties expected of him by Respondent such as preventive maintenance and some repairs to be performed by the crew. Although he inquired of the specific areas of failure to perform tasks, he was not given any specifics by Stevens and Clark. Ford told Stevens and Clark that his crew was shorthanded. Stevens told Ford he should force the other employees to work overtime on Saturdays. Ford told Stevens that Stevens and Clark had the responsibility for authorizing overtime and that he (Ford) did not have that authority. Ford testified that Stevens then agreed with him and that Clark nodded his head "yes" in response to Ford's statement. Ford testified that at the end of this meeting he was handed a document dated October 23, 2000, outlining the aforesaid areas of his alleged deficiencies and signed by Stevens which also stated that Stevens would follow up with him on the following Monday, October 30, 2000, but that Stevens did not followup and that "nothing more was ever said about this."

Ford testified he was called into another meeting on November 8, 2000. This meeting was held in the human resources office and attended by Stevens, Clark, and Human Resources Manager Mike Yaus. Yaus told him that although "the NLRB had ruled that we were not management staff, they could adjust our pay rate at anytime they felt necessary." Yaus then told him he was being cut down to $17.50 an hour, which was a $1.75 per hour reduction. Yaus told him the reason for the cut was they had just added a supervisor and were intending to add a third supervisor. Yaus then handed him the job specification of the "supervisor/lead" responsibilities. He had never seen this before.

Floyd Mann who is a technician in the maintenance department testified that in November 1998, he became an acting lead maintenance technician in the maintenance department. Mann

attended a union meeting the end of July 2000 and signed a union card at that meeting. Mann also attended a union avoidance meeting prior to the election called by Human Resources Manager Yaus. All of the maintenance employees except Saunders and Ford were present as were Dan Urbano, the Respondent's corporate human resources representative and supervisors, Stevens and Clark. Mann testified that he sat next to Yaus at the meeting and observed Yaus holding a piece of paper which contained the names of the employees with the letters "U" or "N" marked beside their names. He recalled seeing his name and that of employees Larry Saunders, Terry Bough, Robert Ford, and John Honald. There was a "U" behind each of the foregoing employees' names.

The next day Mann spoke to Supervisor Stevens concerning the list. Stevens took Mann to see Plant Manager Lenny Pelifian who told him not to worry about it as there would be no retaliations. Mann asked Pelifian about his own position and Pelifian repeated that there would be no retaliation. Mann testified further that around November 10 or 11 (2000), Supervisor Stevens told him that Respondent "was going to take my dollar away for being acting lead because it wasn't fair that Larry (Saunders) and Bob (Ford) got their money taken away." The wage reduction was actually $1.25 per hour.

Parts clerk, Tracy Shoemaker, testified she worked in the maintenance department and attended a meeting of the maintenance employees about a week prior to the election, which was conducted by Plant Manager Lenny Pelifian, Human Resources Representative Dan Urbano, and Human Resources Manager Mike Yaus. During the meeting she observed Yaus hold a piece of paper which had a list of the maintenance employees' names on it. Behind each name was a "U" or "N" or a question mark. She believed the U to mean Union and the N to mean nonunion and the question mark to mean undecided as to whether each employee supported the Union in the upcoming election.

With respect to the reductions in wages the complaint alleges that the reductions were violative of Section 8(a)(1) and (3) of the Act as Respondent has discriminated in regard to hire or tenure or terms or conditions of employment of its employees because of their engagement in union or protected concerted activities. It also alleges that the reductions imposed by Respondent violated Section 8(a)(1) and (4) of the Act by discriminating against employees for giving testimony under the Act. It also alleges that Respondent violated Section 8(a)(1) and (5) of the Act by implementing a change in its employees' wages by the reductions without affording notice to the Union and without affording the Union an opportunity to bargain with Respondent concerning the change and the effects of the change.

The Respondent, in addition to its general denials in its answer to the above complaint allegations, has asserted affirmative defenses contending that employees Ford, Saunders, and Mann were supervisors of Respondent within the meaning of Section 2(11) of the Act, that the unit described in the complaint is not an appropriate unit because it includes persons who are supervisors within the meaning of Section 2(11) of the Act, and that the Petition in Case 9–RC–17437 which resulted in the election and tally of ballots referenced in the complaint was invalid due to supervisory taint. In its affirmative defense Respondent concludes that as set out in its request for review of the Regional Directors Decision and Direction of Election dated September 29, 2000, its objections to conduct of election dated November 6, 2000, and its request for review of the Regional Director's supplemental decision and certification of representation dated December 11, 2000, in Case 9–RC–17437, the certification of representative referenced in the complaint is invalid.

Analysis

I find the Respondent's affirmative defenses are without merit and should be dismissed. Initially Respondent gave no reason for the reduction in wages of its lead maintenance technicians Saunders and Ford. Its then acting lead maintenance technician, Mann testified that Supervisor Stevens attributed the reduction to the addition of a supervisor and plans to add another. However, Respondent never chose to articulate the reason for the reduction, other than it did not agree with the Regional Director's finding that lead technicians Saunders and Ford were not supervisors under Section 2(11) of the Act and that it could thus take any actions it wanted to with respect to their employment status, wages, and terms and conditions of employment. In it's posthearing brief, Respondent disclosed that it contends that it "was required to take some action in relation to the Maintenance Leads in order to be provided with the opportunity to fully litigate their Section 2(11) status."

I find the Regional Director's determination as affirmed by the Board in its denial of Respondent's request for review, does not preclude the Respondent from challenging the Regional Director's determination that the lead employees are employees rather than statutory supervisors. The Board held in *Union Square Theatre Management*, 326 NLRB 70 (1998), that the "determination is not binding on the Board when violations of Section 8(a)(1) and (3) are alleged, as they are here and the resolution of those issues turns on the individuals status." In *Union Square*, the Board noted:

> That normally, when an employer in an unfair labor practice case is resisting a bargaining obligation, it is precluded by Section 102.67(f) (of the Board's Rules and Regulations) from relitigating the appropriateness of a unit that was found appropriate in the representation case.

The Board found in that case that the Respondent is entitled to relitigate the issue of whether certain technical employees "were protected employees or unprotected supervisors . . . in connection with the Section 8(a)(1) and (3) charges." In this regard the parties were permitted to develop the record by submitting evidence concerning this matter and I also received and reviewed the Regional Director's Determination and Direction of Election. I have reviewed the evidence presented by the parties at the hearing in the case before me and I conclude that based on the record as a whole and for the reasons set forth by the Regional Director in his determination that the lead maintenance technicians do not possess the authority in the interest of the Respondent to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees of Respondent or to responsibly direct them, or adjust their

grievances or to effectively recommend such actions. The burden of proving an employee is a supervisor so as to lose the protection of the Act accorded "employees" under Section 2(3) of the Act is on the party asserting supervisory status. *Northcrest Nursing Home*, 313 NLRB 491 (1993). Where the evidence is conflicting and inconclusive, supervisory status will not be found *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

In the instant case I find that Respondent did not meet its burden of proof in asserting the supervisory status of lead maintenance technicians Saunders and Ford and acting lead maintenance technician, Mann. Rather, I found the evidence of supervisory status of these employees to be meager and sporadic. I am convinced that these lead employees had virtually no semblance of supervisory status based on what they did and any secondary indicia of supervisory status or lack thereof. As the Regional Director found, there was no evidence that these lead employees did other than perform ministerial acts in directing employees in their crew but rather the leadman themselves performed essentially bargaining unit work, the majority of their working time. They did not assign overtime, discipline employees, hire them, and their participation in the hiring and evaluating process was limited to giving input to the manager who did the hiring in a single instance. There was no indication that these lead employees were involved in the disciplinary process except for a single instance where former maintenance manager Bill Vith, ordered Saunders to issue a disciplinary warning which Vith had decided to issue. Moreover the secondary indicia of supervisory status was clearly absent in this case. The lead employees were hourly paid, and received overtime whereas supervisors were salaried. The benefits accorded the lead employees were different than those received by supervisors. I thus conclude that the lead maintenance technicians were not supervisors under Section 2(11) of the Act but rather were rank and file employees properly included in the unit. *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981); *Feralloy West Co.*, 277 NLRB 1083, 1084 (1985); I thus conclude that all of Respondent's affirmative defenses must fail as they are premised on a finding of the supervisory status of the lead maintenance technicians which has clearly not been established in this case.

The facts of the reduction in wage are largely undisputed. The Respondent had knowledge of the engagement of Saunders, Ford, and Mann's union activities and the support of the Union's position in the representation case by the lead employees. The recording by Respondent of the "U" behind their names is evidence of Respondent's knowledge of their support of the Union. The Respondent had animus against the Union as evidenced by its resistance to the union campaign and its antiunion meetings held among its employees. The unexplained adverse employment action was taken against the three lead employees on the ground that they were considered to be supervisors by Respondent and that Respondent was thus free to reduce their wages. No further explanation was offered to the employees with the exception of Stevens' statement to Mann that the Respondent had added a supervisor and had plans to hire another. Respondent did not develop the accuracy or rationale of Stevens' statement at the hearing.

I find that the General Counsel has established a prima facie case of violations of Section 8(a)(1) and (3) of the Act by Respondent by the reduction in the hourly wages of Saunders, Ford, and Mann. General Counsel has established that the employer had animus against the Union by its conduct of antiunion meetings, and by its marking of "U's" and "N's" beside employees' names on a list held by Human Resource Manager Yaus and by Mann's testimony of his conversation with Stevens and Pelifian concerning the designation of a "U" behind his name as well as by the employees' testimony that they signed union authorization cards and attended a union meeting. I find that the adverse employment action of reducing the hourly wages of Saunders, Ford, and Mann was motivated at least in part by its antiunion animus. In this case the timing of the unexplained adverse job action taken solely against these three employees following their testimony and the Regional Director's determination are significant in establishing the prima facie cases of the violations of Section 8(a)(1) and (3). Thus, disparate treatment has been established as no other employees received these unexplained reductions in wages. I have found that the affirmative defenses of Respondent are without merit. I further find that the explanation of Respondent in its brief that the actions were taken in order to relitigate these lead maintenance technicians' inclusion in the unit does not rebut the prima facie case which I find has not been rebutted by the preponderance of the evidence. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

I further find that Respondent violated Section 8(a)(1) and (4) of the Act by its reduction of the wages of Saunders and Ford who both testified at the representation hearing adversely to the Respondent's position that they were supervisors and that they, thus, should not be included in the unit. I find that a motivating factor in Respondent's decision to reduce their wages was their providing testimony at the Board hearing. *Q-1 Motor Express, Inc.*, 323 NLRB 767, 775 (1997). The *Wright Line* causation analysis applied here also and Respondent has failed to rebut the prima facie cases of violations of Section 8(a)(1) and (4) of the Act by the preponderance of the evidence.

I further find that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally reducing the wages of Saunders, Ford, and Mann without affording the Union notice and an opportunity to bargain. In this case the Board election was held on October 19, 2000, and was won by the Union. On November 7, Respondent filed objections to the election and on November 8, it unilaterally reduced the wages of Saunders and Ford and later that of Mann. An "employer acts at its peril in making changes in terms and conditions of employment during the period that objections are pending and the final determination has not been made." *Indiana Hospital*, 315 NLRB 647, 655 (1994); *Mike O'Conner Chevrolet*, 209 NLRB 701, 703 (1974).

B. The Alleged Threat and Refusal to Rehire Adam Harris

Adam Harris testified as follows: He was employed by Respondent from December 8, 1997, to August 17, 2000. He was a packaging maintenance technician in the maintenance de-

partment. He signed a union authorization card on July 31, 2000, in Respondent's parking lot. On July 27, 2000, Harris and four other employees who worked in the maintenance department were transferred into the production department. The transfer was ordered by Plant Manager Lenny Pelifian who told the employees they were being transferred because they "generated paperwork." Harris then told Pelifian, "its kind of a coincidence we're being moved. Does this have anything to do with us being transferred because of the meeting being held this weekend about a union." (Note: This was in reference to an upcoming meeting with the Union which was conducting a campaign to represent the employees in the maintenance department which ultimately resulted in the election and certification of the Union for the maintenance unit employees.) In response to the inquiry by Harris, Pelifian said, "No, that's not it."

Harris testified further that on August 17, 2000, about 7 to 7:30 in the morning, they were finished with setting up the machines in the packaging department to which he was assigned and were ready to start production. He walked over to production supervisor, Melissa Johnson, and asked her who was going to cover for Phillip White on the second shift since Shane Bevins had been suspended. (Note: Harris was then working on the first shift.) Johnson said she was unaware of the suspension of Bevins. Harris then suggested that coworker Eric Clarkson go to second shift. Clarkson said he did not want to go to second shift. Johnson then said to Harris "why don't you volunteer to go to this shift." He explained to her that it made no sense to have the two employees (Harris and Phillip White) who best knew electrical work on the same shift. Johnson did not accept his suggestion but said he should volunteer. He then told her of a previous instance wherein he had asked and received permission for a day off but that it had later been cancelled by management. He then told her he had been "thinking about leaving this place, ever since the Union came around." Johnson then said, if you're "going to, why don't you quit." Harris then looked at her and said, "[F]ine, I can't talk to you and went to the maintenance shop." He went there to talk to Donnie Stevens who was the only maintenance supervisor there that morning. He told Stevens, "I just got finished trying to talk to Melissa about getting coverage for Phillip on second shift and she pretty much just kind of crapped on me." He told Stevens, "ever since the Union came around here . . . maintenance has been treated like . . . the black sheep . . . like crap." Stevens told him to calm down, and take a break, that he would call Johnson. Harris did so and then walked up to the "bullpen area" where the production supervisors have their desks. He met Lisa Cole, a production employee and told her what had happened between him and Johnson and he told her that since the union issue arose, everything was in a "mess." He told her that if he did not see her again, it had been nice working with her. He then went to the maintenance shop and saw Stevens who told him he had just talked to Johnson and they had agreed. At that point Harris interrupted Stevens and said he would do the twelve noon to midnight shift which was a split shift. Stevens said, "cool." "That's what me and Melissa (Johnson) had talked about . . . just clock out at eight o'clock and come back at eleven thirty." Stevens said Johnson had approved that. It was almost eight o'clock and he went to the time clock to clock out at eight o'clock and he saw Johnson and asked her whether it was "cool" that he would clock out at eight o'clock and be back at eleven thirty to work the noon to midnight shift and she replied, "yes. That's cool." He then clocked out at 8 a.m. went home and came back at 11:30 a.m. He walked into the maintenance shop, with his tool bag and put on his cold weather gear. Stevens then came down and asked him if everything was "cool." He replied, "yes." At that point Johnson came into the shop and said that Plant Manager Pelifian had overruled their agreement for him to work the split shift from noon to midnight. He and Stevens asked her what was going on. She replied that she did not know but that Pelifian wanted to talk to Harris. Stevens accompanied him to Pelifian's office. Pelifian asked him what was going on. Harris then related the entire incident and that they had agreed for him to clock out at 8 a.m. and return at 11:30 a.m. to work the noon to midnight shift and that he had returned at 11:30 a.m. and was now in Pelifian's office. Pelifian then said that maintenance was trying to bring in a union and he (Harris) knew the Company's policy on the Union, that maintenance was making a bad mistake and we're going to fight the Union and we're going to win. He said his bosses were backing him up and he was going to be plant manager whether the Union was there or not. Pelifian said "with maintenance bring(ing) union in and you know the Company's policy on the Union and me being a factor in this Union, why should he allow me to stay at the plant." Harris then asked "well, Lenny (Pelifian) what does this have to do with what went on between me and Melissa (Johnson) out on the floor." Pelifian then leaned back and said, "I'll tell you what. Don't work today. Come back tomorrow." Harris then left the office and went home.

On the next day, August 18, Harris returned to the plant at his regular time (5:30 a.m.) with his tool bags and was met by the security guard who said, "Hey Adam, I'm not supposed to allow you on the property." At that point Johnson came out and Harris said he was supposed to come back to talk to Pelifian. Johnson agreed and told the guard this. The guard said he had a note on his desk not to let Harris back in because he had been terminated. At that point Stevens came out and Harris asked him to check it out and Stevens agreed to do so. Harris then went home. He then called Stevens at 10 (a.m.) that day and Stevens told him he had been terminated. A couple of days later he received a letter from Human Resources Manager Yaus informing him that he had tendered his resignation to Terry Kitts, Melissa Johnson, and human resources and that his resignation was accepted and his employment was terminated effective August 17, 2000.

Harris testified that other employees have quit their position with Respondent and had been permitted to return to work. He specifically testified that packaging machine operator Kathy Williams had told him she was going to quit but was unable to testify of his own personal knowledge whether she had done so. He also testified that packaging machine operator Willis had walked off the job numerous times when he became upset with his machine and threw off his safety helmet, threw it on the floor, took off his white smock, threw it, "on the floor and say I quit and bolt(ed) out of the packaging room." Willis was per-

mitted to return to work after this. Harris testified he had received an award for doing well in a training class at Respondent's Yuma, Arizona plant. He testified he had received a warning for showing disrespect to a supervisor and had received warnings for tardiness.

On cross-examination he denied that Melissa Johnson had seen him in the bullpen area and that she had told him, if you're going to quit you should tell HR (human resources). He testified that the HR office was locked and no one was there until 8 a.m. when he scanned out. He testified he had not gone to the union meeting but was aware there was a rumor about a union meeting having occurred. When he was in the bullpen he talked to Lisa Cole and to Terry Kitts. He shook Terry Kitts' hand and said it had been nice working with him, if he did not see him again. He told Kitts "about the Union coming around." He saw Willis walk off the floor three or four times. He admitted having been verbally reprimanded for engaging in horseplay on the floor. Respondent presented evidence of other disciplinary actions taken against Harris.

Analysis

There is no allegation in the complaint concerning the initial termination of Harris by reason of his voluntary quit. Nor is constructive discharge alleged. All of the witnesses supported the conclusion that Harris did voluntarily quit on August 17, because of his dissatisfaction with being asked to leave his shift and return later in the day to work a split shift. Although Harris believed himself to have been treated unfairly, there was no evidence that the circumstance leading up to his being asked to volunteer for the split shift by Melissa Johnson was other than an unexpected one brought to Johnson's attention by Harris who told her that one of the mechanics on the afternoon to evening shift had been suspended the previous evening. None of the employees who talked with Harris leading up to his voluntary quit supported his contention that he had made any mention of the Union throughout that morning. Harris himself did not contend that Melissa Johnson who had asked him to volunteer for the split shift had made any mention of the Union. According to Harris he brought up the subject of the Union but Johnson testified he did not bring it up. Harris testified he brought up the subject of the Union in his discussions with Kitts, Bough, and Stevens, but none of them supported his contention that he had made any mention of the Union. Harris denied that he had gone to the human resources office to inform them he was quitting. However, Human Resources Assistant Tara Stickle testified Harris walked into the human resources office the morning of August 16 and 17, 2000, and informed her he was leaving and said goodbye and that she then commenced to process this event on her computer and notified Plant Manager Pelifian by e-mail. Plant Manager Pelifian denied he had made any mention of the Union when Harris came to his office with Stevens to ask for his job back or to be rehired. I do not credit Harris testimony that Pelifian made the remarks attributed to him by Harris concerning Harris' support of the Union as the reason for Pelifin's refusal to rehire him. I credit Pelifian as supported by Stevens that Pelifian asked Harris why he had quit and told Harris he was going to have human resources handle the matter. I credit Human Resources Manager Yaus that he determined not to rehire Harris following his voluntary quit based on the fact he had quit and a review of Harris' disciplinary record.

I thus conclude that Pelifian did not issue the alleged unlawful threat to Harris and that Respondent did not unlawfully refuse to rehire Harris. Assuming arguendo that the General Counsel established a prima facie case of a violation of the Act by Respondent's refusal to rehire Harris, I find it has been rebutted by the preponderance of the evidence. *Wright Line*, supra.

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1), (3), (4), and (5) of the Act by reducing the hourly wage rate of lead men Larry Sanders, Robert Ford, and acting leadman Floyd Mann.

4. Respondent did not unlawfully threaten and/or refuse to rehire Adam Harris because of his union activities.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in violations of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative actions to effectuate the purposes and policies of the Act and post the appropriate notice.

It is recommended that Respondent restore the wage rates of the lead men and acting leadman and make them whole for all loss of wages and benefits sustained by them as a result of the unlawful reduction of their wage rates.

All backpay and benefits shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed *in New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[Recommended Order omitted from publication.]